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Suffering in Silence: Asylum Law and the Concealment of Political Opinion as a Form of Persecution Note

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Note

SUFFERING IN SILENCE: ASYLUM LAW AND THE CONCEALMENT OF POLITICAL OPINION AS A FORM OF PERSECUTION

PETER J. SMITH

*In order to be granted asylum in the United States, an applicant has to show that she has suffered persecution, or has a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. Under two different rationales, developed through case law, concealment of one's religious views may constitute persecution in itself. A line of cases, beginning with the Seventh Circuit decision *Muhur v. Ashcroft*, stands for the proposition that an applicant may prove that she has a well-founded fear of persecution if the only way to avoid persecution would be to conceal her religious beliefs. Another rationale, first developed in the Third Circuit case *Fatin v. INS*, holds that an asylum applicant cannot show that concealment of her religion is persecution unless she shows that the act of concealment would be "profoundly abhorrent" to her. The second rationale thus creates a much higher standard for the applicant to meet.*

*This Note will argue that the forced concealment of one's political opinion should be recognized as a form of persecution as well. In recognition of the fundamental purpose of asylum law, as well as the principles of international human rights and American democratic ideals, it is entirely appropriate and desirable to afford the same protection for political opinion applicants as religion applicants. This Note will consider the application of both the *Muhur* and *Fatin* rationales to political opinion, ultimately concluding that the approach developed in *Muhur* is the most suitable and reasonable—both for applicants and immigration policy in general.*

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SUFFERING IN SILENCE: ASYLUM LAW AND THE CONCEALMENT OF POLITICAL OPINION AS A FORM OF PERSECUTION

PETER J. SMITH*

I. INTRODUCTION

"Silence is the universal refuge . . . a balm to our every chagrin."¹ The refuge of silence may offer some protection for individuals afraid of intolerant governments discovering their religious or political beliefs. Ideas do not bear physical characteristics, and a closet dissident can avoid detection much more easily than an ethnic minority with recognizable physical features. A Christian in Saudi Arabia or a democrat in China, for example, could live an entire life without detection if she never attended religious services or openly expressed her political views. Those who do practice their beliefs openly, thereby facing the risk of persecution, are more likely to display the well-founded fear of persecution necessary to be granted asylum in the United States.² Unexpressed convictions, after all, create less exposure to danger.

Concealment, however, is not a viable option for individuals with strong convictions. To ask a Buddhist monk not to light incense or an Orthodox Jew not to wear a yarmulke may be tantamount to requiring renouncement of deeply held beliefs. Courts have emphasized that no one should be expected to choose between abandoning his or her faith and being persecuted.³ Some courts have even considered concealment of one's religious beliefs to be a form of persecution in and of itself.⁴ In this sense, silence is far from a balm or a refuge; it is a state of mental suffering, from which refugees should be entitled to protection.

Religious beliefs are perceived as fundamental and inviolate; courts do not expect people to hide or change their religion any more than they can change the color of their skin. But people similarly define themselves

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¹ Henry David Thoreau, *A Week on the Concord and Merrimack Rivers*, in *WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU* 301, 435 (Brooks Atkinson ed., 1965).

² See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006) (defining a refugee as an individual with a "well-founded fear of persecution" on account of a protected ground).

³ See, e.g., *Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004) (holding that the ability of the asylum applicant to conceal his or her religion does not defeat the claim of religious persecution).

⁴ See, e.g., *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011) ("[R]efusing to allow a person to practice his religion is a common form of persecution.").

according to their personal political views. An activist may practice her deeply held political philosophy by lobbying, demonstrating peacefully, and assembling with like-minded individuals with the same fervor as a devout monk praying the rosary. To hide one's views and feign agreement with the practices of an oppressive regime could be as psychologically tormenting as renouncing one's religious faith. Being forced to conceal one's political opinion, therefore, could be perceived as a form of psychological persecution.

Stifling one's political speech to escape harm also runs contrary to the purpose of political asylum: protecting an individual's right to free expression in the face of government repression. Therefore, a person could be considered to face "constructive persecution" even if she could—and likely would—stay quiet to avoid being persecuted. Courts, generally, have not yet taken either of these views; instead they have traditionally focused on whether there is a reasonable possibility that the persecutors will discover the individual's political beliefs and punish her for these beliefs. As this Note will contend, however, the constructive persecution approach has already been followed implicitly in the context of religion.

This Note examines how the very act of concealment of political opinion may, in fact, constitute persecution, and argues that expanding asylum law to protect against such persecution would be appropriate. Part II reviews both the history of asylum law in the United States, and the current statutory requirements for asylum. Part III focuses on persecution on account of religion, and examines how some courts have considered concealment of religious belief to be psychological or constructive persecution. Part IV discusses how the concept of keeping quiet as a form of persecution, as developed in the religion context, could be expanded to political opinion and explores two standards from case law that courts could follow. Part V analyzes the possible implications of these approaches to political opinion asylum cases and explains why the constructive persecution approach, derived from the religion cases, is the most suitable—especially considering the similarities between religion and political opinion. Part VI concludes with a recommended course of judicial interpretation for the future.

II. BACKGROUND AND HISTORY OF U.S. ASYLUM LAW

For as long as the United States has existed, it has been a destination for people fleeing political and religious intolerance. In 1776, Thomas Paine remarked: "This new world hath been the asylum for the persecuted lovers of civil and religious liberty from every part of Europe."⁵ Immigration law was relatively open and unregulated until the late

⁵ THOMAS PAINE, *COMMON SENSE* 22 (Peter Eckler Publ'g 1914) (1776).

nineteenth century, and the Puritans of Plymouth Rock,⁶ Russian Jews of the nineteenth century,⁷ and Vietnamese “boat people” of the 1970s⁸ all saw the United States as a refuge from persecution. Beginning with the Chinese Exclusion Laws in 1882,⁹ however—and continuing with immigration quotas in the 1920s—Congress began to actively attempt to curb the rising flow of immigrants, and to keep out certain disfavored ethnic groups.¹⁰

Nevertheless, other avenues opened up for refugees seeking admission on an ad hoc basis.¹¹ First, starting after World War II, Congress began enacting legislation to accept qualified individuals from specific countries undergoing crises as refugees.¹² The Cuban revolution in 1959, for example, led Congress to pass the Cuban Refugee Adjustment Act, allowing Cuban immigrants fleeing Fidel Castro’s regime to stay in the United States¹³ Second, the Immigration and Nationality Act of 1952 (“INA”) gave the Attorney General the power to temporarily parole aliens due to humanitarian or public interest concerns.¹⁴ The INA also authorized the Attorney General to prevent the deportation of noncitizens to countries

⁶ See Joel H. Swift, *To Insure Domestic Tranquility: The Establishment Clause of the First Amendment*, 16 HOFSTRA L. REV. 473, 478 (1988) (noting that the Puritans came to Plymouth for religious freedom).

⁷ See Amir Steinhart, Note, *Old Shtetlism and New Urbanism: Uncovering the Implications of Suburban Zoning Laws for Community Life Through the Jewish-American Experience*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 255, 266–67 (2010) (“Seeking to escape the persecution that followed the assassination of Alexander II of Russia in 1881, and dreaming of a land where they would not face violent pogroms and stringent limitations on their livelihood and basic rights, hundreds of thousands of panic-stricken Jews began pouring westward out of Russian territory.”).

⁸ See Minh-Duc T. Le, Note, *ROVR: Resettlement Opportunities for Vietnamese Returnees or Refoulement of Vietnamese Refugees?*, 12 GEO. IMMIGR. L.J. 125, 126 (1997) (describing the refugees who escaped Vietnam by boat after the fall of Saigon in 1975).

⁹ E.g., Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943); see also Margot K. Mendelson, Note, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012, 1019 (2010) (describing the exclusion of Chinese laborers in the 1880s).

¹⁰ E.g., Emergency Immigration Act of 1921, ch. 8, 42 Stat. 5 (repealed 1952) (setting annual quotas at three percent of 1910 foreign-born population levels); see also Mendelson, *supra* note 9, at 1018–21 (detailing the first comprehensive immigration laws, intended to limit the number of immigrants, especially from outside Northern Europe).

¹¹ See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 10–11 (1981) (“Gradually, the United States publicly assumed responsibility for refugees who were fleeing new conflicts in the developing world as well as those displaced following World War II.”).

¹² See *id.* at 12–13 (“Insofar as Congress was willing to make exceptions to the restrictive immigration policy of the post-war era, refugees were admitted within narrowly circumscribed limits to discharge responsibilities towards persons uprooted by [World War II], or as a gesture to the anti-communist preoccupation of the Cold War Era.”).

¹³ Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (2006)).

¹⁴ 8 U.S.C. § 1182(d)(5)(A); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 502 (2009) (stating that the application of the provision is considered on a case-by-case basis).

where they would face “physical persecution.”¹⁵ Such protection, known as withholding of removal, was initially discretionary, despite being mandatory under the 1951 U.N. Convention and 1967 Protocol relating to the Status of Refugees (“Protocol”),¹⁶ which the United States ratified in 1968 but failed to support with appropriate legislation until 1980.¹⁷

A. *The Refugee Act of 1980*

The United States fulfilled its obligations under the Protocol by passing the Refugee Act in 1980.¹⁸ Not only did the Act make withholding of removal mandatory for those who face persecution, but it also created a new status designation that provided a path to permanent residence and citizenship: asylum.¹⁹ To be granted asylum or withholding of removal, an applicant must be physically present in the United States and qualify as a “refugee.”²⁰ Congress relied on the 1951 Convention Relating to the Status of Refugees²¹ in defining a refugee as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²²

A noncitizen bears the burden of establishing his or her past

¹⁵ Pub. L. No. 82-414, 66 Stat 163, 214, *amended by* Pub. L. No. 104-208, § 307(a), 110 Stat. 3009 (1996) (codified as amended at 8 U.S.C. 1231(b)(3)).

¹⁶ Convention and Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

¹⁷ *See id.* (indicating that the United States acceded to the Protocol in 1968); REGINA GERMAIN, *ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 24 (6th ed. 2010) (explaining that U.S. law initially did not conform with international obligations under the Protocol).

¹⁸ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

¹⁹ 8 U.S.C. § 1158.

²⁰ *Id.* §§ 1158(a)(1)–(b)(1)(A), 1231(b)(3).

²¹ *See* Convention Relating to the Status of Refugees, ch. I, art. 1, July 28, 1951, 189 U.N.T.S. 150 [hereinafter *Convention*] (defining a refugee as “any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”).

²² 8 U.S.C. § 1101(a)(42).

persecution,²³ or well-founded fear of future persecution, based on one of five protected grounds before an asylum officer or immigration judge.²⁴ Courts have generally held that the persecutor may either be the government or a private actor that the government is unable or unwilling to control.²⁵ The Attorney General or Secretary of Homeland Security may then grant asylum status at his or her discretion to an alien who meets the refugee definition and is not ineligible under various statutory bars.²⁶ An asylum seeker may be ineligible, for example, if she firmly resettled in another country after leaving the country of persecution, failed to apply for asylum within one year after entering the United States, or has engaged in terrorist activities or associations at any time.²⁷ An individual meeting the definition who fails to obtain asylum must still be granted withholding of removal if his or her life or freedom would be threatened in the home country.²⁸ A prerequisite for both of these designations is the ability to meet the statutory definition of “refugee,” including its requirement of a “well-founded fear” of persecution.

B. *The “Well-Founded Fear” Standard*

The term of art “well-founded fear,” as used in the definition of refugee, has sparked considerable discussion within immigration law due to its ambiguity. The Board of Immigration Appeals (“BIA”) held in *In re Acosta*²⁹ that a “well-founded fear of persecution” is equivalent to a “clear probability of persecution,” the standard for withholding of removal.³⁰ The

²³ Past persecution creates a rebuttable presumption of future persecution, which the government can overcome by showing that there has been a change in country conditions that removes the applicant’s well-founded fear of persecution or that the applicant could reasonably be expected to relocate to a different part of his or her country to avoid persecution. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1) (2010). Even if the Government meets its burden and the applicant does not have a well-founded fear of persecution, he or she may still be granted asylum if he or she has shown “compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution” or “that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.” *Id.* §§ 208.13(b)(1)(iii), 1208.13(b)(1)(iii).

²⁴ 8 U.S.C. § 1158(b)(1)(B)(i).

²⁵ *E.g.*, *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 592 (3d Cir. 2003); *Valioukevitch v. INS*, 251 F.3d 747, 749 (8th Cir. 2001).

²⁶ 8 U.S.C. § 1158(b)(1)(A).

²⁷ *Id.* §§ 1158(a)(2)(B), 1158(b)(2)(A)(v), 1158(b)(2)(A)(vi).

²⁸ *Id.* § 1231(b)(3) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”). The individual has to show that it is more likely than not that he or she will face persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). An individual is barred from withholding if he or she has persecuted other individuals, committed a particularly serious crime, or is a danger to the security of the United States. 8 U.S.C. § 1231(b)(3)(B).

²⁹ 19 I. & N. Dec. 211 (BIA 1985).

³⁰ *Id.* at 229.

Supreme Court, however, overruled this holding. In 1987, in *INS v. Cardoza-Fonseca*,³¹ the Court held that the withholding standard was stricter than the asylum standard, and an individual may pass the "well-founded fear" test even if there is a less than fifty percent chance of persecution in his or her home country.³² Indeed, the actual probability of being punished for illegitimate reasons may be as little as ten percent as long as the applicant has an objectively reasonable fear of such punishment.³³

Before persecuting an individual for a protected characteristic, the persecutor first must become aware of that characteristic. In *In re Acosta*, the BIA held that the alien has to demonstrate that "the persecutor is already aware, or could easily become aware, that the alien possesses th[e] belief or characteristic" that is the basis for the persecution.³⁴ Two years later, after the Supreme Court overruled *Acosta's* "clear probability" standard, the BIA responded by dropping the word "easily" in *In re Mogharrabi*.³⁵ The BIA acknowledged that it was loosening the standard when it held that "it is enough for the applicant to show that the persecutor *could* become aware that the applicant possesses the belief or characteristic in question."³⁶ Nonetheless, only a year after *Mogharrabi*, the BIA held in *In re Vigil*³⁷ that a Salvadorian national had not established a well-founded fear of persecution—based on his neutral stance during the civil war—because he had not affirmatively stated his neutrality.³⁸ Instead, the applicant had stayed quiet about his wish to remain neutral, as such, reasoned the court, there was no reasonable threat of the guerillas discovering his neutrality and targeting him for recruitment because of it.³⁹ Taken together, these opinions suggest that there must be at least a reasonable chance of the persecutor discovering the applicant's trait for the applicant to fear persecution on account of it; therefore, an individual who fails to assert her political views openly may not be able to demonstrate the requisite well-founded fear.

³¹ 480 U.S. 421 (1987).

³² *Id.* at 431.

³³ *See id.* (stating that even someone with a ten percent chance of being killed could have an objectively reasonable, well-founded fear of persecution); *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000) ("An alien's fear may be well-founded even if there is only a slight, though discernible, chance of persecution.").

³⁴ *In re Acosta*, 19 I. & N. at 226.

³⁵ 19 I. & N. Dec. 439, 446 (BIA 1987).

³⁶ *Id.* (emphasis added).

³⁷ 19 I. & N. Dec. 572 (BIA 1988).

³⁸ *Id.* at 576–77.

³⁹ *Id.* at 577.

C. Protected Grounds as Immutable or Fundamental Characteristics

The persecution an asylum applicant fears has to be on account of one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁴⁰ The Supreme Court has interpreted “on account of” to mean that the persecution is motivated by the persecutor’s hostility towards some characteristic held by the individual, rather than by a generalized political or religious motive for persecution.⁴¹ For example, the applicant may show that that he or she is an active member of a protest group whose members the government punishes for their opposition,⁴² or that members of his or her religion are specifically targeted for oppression.⁴³ An applicant may also be eligible for protection even if the persecutor merely imputes one of the five protected characteristics to her.⁴⁴ Protection does not, however, extend to those who fear harm solely from a civil war⁴⁵ or a personal vendetta.⁴⁶ Persecutors may have mixed motives, but the protected characteristic of the asylum seeker has to be “at least one central reason” for the persecution.⁴⁷

⁴⁰ 8 U.S.C. § 1101(a)(42) (2006).

⁴¹ *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992). In *Elias-Zacarias*, the Court held that a guerilla organization was acting out of a generalized political motive in forcibly recruiting members, not on account of the victim’s political opinion, especially since the guerillas had no knowledge of the victim’s neutral political stance. *Id.*

⁴² See *Canjuna-Flores v. INS*, 784 F.2d 885, 889 (9th Cir. 1985) (holding that a Salvadorian national established a clear probability of persecution in his country because of his activity with the Popular League, an opposition group that the government persecuted).

⁴³ See *Gomes v. Gonzales*, 473 F.3d 746, 756–57 (7th Cir. 2007) (remanding the immigration judge’s denial of asylum for a Catholic Bengali individual whose testimony and supporting letter from a parish priest established that Catholics faced harassment, threats, and violence in Bangladesh); see also 8 C.F.R. §§ 208.13(b)(2)(iii), 1208.13(b)(2)(iii) (2010) (stating that the applicant does not have to show that he or she would be singled out for persecution if he or she demonstrates in his or her country that there is a pattern of “persecution of a group of persons similarly situated to the applicant” on the basis of a protected ground, and “the applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable”).

⁴⁴ *In re S-P-*, 21 I. & N. Dec. 486, 490 (BIA 1996) (affirming that persecution on account of an imputed political opinion can give rise to a valid asylum claim); GERMAIN, *supra* note 17, at 44 (“When the persecution inflicted on the asylum applicant is because of an imputed characteristic related to any one of the five protected grounds, the persecution is ‘on account of’ that characteristic, regardless of whether the applicant possesses it.”).

⁴⁵ *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985) (stating that “physical injury arising out of civil strife or anarchy in a country did not constitute persecution” according to the pre-Refugee Act meaning of persecution, and this interpretation remains the same under the Refugee Act).

⁴⁶ *In re Y-G-*, 20 I. & N. Dec. 794, 799 (BIA 1994) (“Aliens fearing retribution over purely personal matters will not be granted asylum on that basis.”).

⁴⁷ 8 U.S.C. § 1158(b)(1)(B)(i) (2006); see also *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 212–13 (BIA 2007), *aff’d as modified* by *Ndayshimiye v. Att’y Gen.*, 557 F.3d 124, 133 (3d Cir. 2009) (determining that an asylum applicant’s persecutor may have more than one motive but one of the five protected grounds must be at least one central reason for the persecution).

The protection of these five characteristics underscores their centrality in international human rights discourse. The BIA has reasoned that all of these grounds are protected because they are either immutable or so fundamental that individuals are generally not expected to change them. It articulated this interpretation in *Acosta* in the course of defining the most ambiguous ground, membership in a particular social group ("PSG"). The BIA drew an analogy to the other protected grounds, such as religion or political opinion, in determining that members of a PSG must share a common trait that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."⁴⁸ The BIA rested this definition on the fact that all five of these traits define an individual's identity, and to require a person to change them would violate his fundamental rights. Applying the standard, the BIA, in subsequent cases, has interpreted the PSG ground to include members of a tribe or clan,⁴⁹ homosexuals,⁵⁰ and women who oppose genital mutilation,⁵¹ acknowledging that these groups all may fear persecution based on their fundamental group characteristics.

III. RELIGIOUS PERSECUTION AND THE CONCEALMENT OF AN INDIVIDUAL'S BELIEFS

Before examining concealment of political opinion, it is worth considering concealment of religion, for which more extensive case law has been developed. Asylum law protects individuals who have suffered religious persecution or have a well-founded fear of such persecution. Persecution on account of religion may consist of being targeted for being a member of a religious group, for expressing religious beliefs, or for engaging in religious practices such as wearing distinctive clothing or observing certain holidays.⁵² In addition, it may include punishment resulting from refusal to follow the religious norms and codes of society,⁵³

⁴⁸ *In re Acosta*, 19 I. & N. at 233. This definition has been accepted by all courts of appeal that have considered it. *E.g.*, *Crespin-Valladares v. Holder*, 632 F.3d 117, 124 (4th Cir. 2011); *Bi Xia Qu v. Holder*, 618 F.3d 602, 606–07 (6th Cir. 2010); *Perdomo v. Holder*, 611 F.3d 662, 665–66 (9th Cir. 2010); *Pavlyk v. Gonzales*, 469 F.3d 1082, 1087–88 (7th Cir. 2006); *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 171 (2d Cir. 2006).

⁴⁹ *In re H-*, 21 I. & N. Dec. 337, 338 (BIA 1996).

⁵⁰ *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (BIA 1990).

⁵¹ *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996).

⁵² See U.N. High Comm'r for Refugees, *Guidelines on International Protection: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, 3–4, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004), available at <http://www.unhcr.org/publ/PUBL/40d8427a4.pdf> ("Claims based on 'religion' may involve one or more of the following elements: a) religion as belief (including non-belief); b) religion as identity; c) religion as way of life.").

⁵³ See *In re S-A-*, 22 I. & N. Dec. 1328, 1336–37 (BIA 2000) (holding that a Moroccan girl who had been beaten by her father for her refusal to cover herself and stay in the house had established a

or conversion from one religion to another.⁵⁴ To prevail on a claim of religious persecution, the applicant also has to show not only that her home country persecutes individuals belonging to, believing in, or practicing a particular religion, but that she is a genuine believer, practitioner, or member of that religion.⁵⁵

An applicant with religious beliefs that are not tolerated by an oppressive regime may find that renouncing these beliefs is the only way to avoid persecution. But the believer could also hold onto these beliefs and simply conceal them from the authorities by refraining from any public expression or practice that might draw attention to the individual's hidden beliefs. Such a choice, though, may be exceptionally difficult or even psychologically tormenting for the firm believer.

A. *The Concealment of Religious Beliefs to Avoid Persecution*

In religion cases, courts generally have been unwilling to deny asylum applications when the applicant could avoid persecution by concealing his or her beliefs. The Seventh Circuit, in particular, has repeatedly affirmed this principle in reviewing BIA decisions. In *Muhur v. Ashcroft*,⁵⁶ the court vacated a BIA decision upholding an immigration judge's denial of the applicant's asylum application on the basis that she would not face persecution in Eritrea because, even if she was a Jehovah's Witness, she was not an active one, and thus would not attract the ire of the Eritrean authorities.⁵⁷ Judge Posner scathingly criticized the immigration judge's assumption that an individual is not entitled to asylum if he or she can avoid persecution by keeping his or her religious beliefs quiet.⁵⁸ To expose the immigration judge's error in concluding that the applicant would not unreasonably draw attention to herself, Judge Posner drew an analogy to the early Christians who were persecuted by the Romans: "[They] faced little risk of being thrown to the lions if they practiced their religion in

claim for asylum based on her religious belief in a liberal understanding of Islam, which differed from her father's Orthodox Muslim beliefs).

⁵⁴ See *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992) (holding that a convert from Islam to Christianity may have a well-founded fear of being discovered and persecuted by the Iranian government).

⁵⁵ Immigration officers will sometimes quiz asylum applicants with basic theological questions relating to his or her purported religion. See GERMAIN, *supra* note 17, at 45 (providing background on the debate surrounding religious knowledge quizzes); see also *Rizal v. Gonzales*, 442 F.3d 84, 90 (2d Cir. 2006) (stating that an applicant can establish the sincerity of his or her religious faith while lacking fully complete knowledge of religious doctrine).

⁵⁶ 355 F.3d 958 (7th Cir. 2004).

⁵⁷ *Id.* at 960.

⁵⁸ *Id.* at 960 ("But the fatal flaw in the immigration judge's opinion lies . . . in the assumption—a clear error of law—that one is not entitled to claim asylum on the basis of religious persecution if . . . one can escape the notice of the persecutors by concealing one's religion.") (internal citations omitted).

secret; it doesn't follow that Rome did not persecute Christians, or that a Christian who failed to conceal his faith would be acting 'unreasonably.'"⁵⁹ This conclusion seems to imply that religious believers should not be expected to practice in secret to avoid persecution for their beliefs.

The following year, Judge Posner restated this point in *Iao v. Gonzales*⁶⁰—vacating the denial of an asylum application for a member of Falun Gong, a group that has been outlawed by the Chinese government.⁶¹ Chinese authorities persecute Falun Gong members by sending them to prisons and reeducation centers, where they face torture and hard labor.⁶² Judge Posner explained that Falun Gong members suffer persecution that can only be avoided by concealment, which does not indicate the absence of a well-founded fear, but actually proves its existence as a motivation for concealment.⁶³

One of the Seventh Circuit's most recent and well-articulated reaffirmations of this principle came in the 2010 case *Shan Zhu Qiu v. Holder*.⁶⁴ Qiu, a Chinese national and private Falun Gong practitioner, fled to Chicago to apply for asylum after his master was arrested and police came to his house several times with summonses.⁶⁵ The immigration judge denied Qiu's petition for asylum, questioning the validity of the summonses and finding that there was not enough evidence to show that Qiu would be punished if he returned to China.⁶⁶ The BIA agreed, emphasizing the uncertainty of the level of punishment Qiu might face.⁶⁷ The Seventh Circuit, however, observed that the police came to Qiu's house just three months after he started secretly practicing Falun Gong, indicating that they were looking for low-level members as well as leaders.⁶⁸ If Qiu continued practicing Falun Gong in China, his fear of suffering severe penalties would have been very reasonable.⁶⁹ The Seventh Circuit concluded that "the only way Qiu can avoid persecution is to cease the practice of Falun Gong or hope to evade discovery. Putting Qiu to such a choice runs contrary to the language and purpose of our asylum

⁵⁹ *Id.*

⁶⁰ 400 F.3d 530, 532 (7th Cir. 2005).

⁶¹ *Id.* at 532. The movement has been called a religion, a cult, or merely an exercise regimen with a spiritual focus. *Shan Zhu Qiu v. Holder*, 611 F.3d 403, 404 (7th Cir. 2010); *Iao*, 400 F.3d at 532.

⁶² *Qiu*, 611 F.3d at 407.

⁶³ *Iao*, 400 F.3d at 532.

⁶⁴ 611 F.3d 403 (7th Cir. 2010).

⁶⁵ *Id.* at 404–05.

⁶⁶ *Id.* at 406.

⁶⁷ *Id.* ("The Board seemed to agree that Qiu was indeed in for some type of punishment in China, but found that Qiu could not prove how harsh it was going to be."). The Board also assumed that since Qiu only practiced for three months, he was a low-level practitioner who faced a lesser degree of punishment. *Id.* at 407.

⁶⁸ *Id.*

⁶⁹ *Id.* at 407–08.

laws.”⁷⁰ The court emphasized that “[a]sylum exists to protect people from having to return to a country and conceal their beliefs.”⁷¹

Other circuit courts have also been reluctant to require concealment of one’s religion as a way to avoid persecution. The Ninth Circuit, in *Zhang v. Ashcroft*,⁷² proclaimed that requiring a Falun Gong member who feared persecution to practice secretly is “contrary to our basic principles of religious freedom and the protection of religious refugees.”⁷³ Although the applicant was ineligible for asylum, the court found that he would more likely than not face persecution in China if he practiced openly and overturned the immigration judge’s denial of withholding of removal.⁷⁴ The Eleventh Circuit also agreed with Judge Posner’s reasoning in *Muhur*, even going so far as to state that “having to practice religion underground to avoid punishment is itself a form of persecution.”⁷⁵ Recently Judge Posner has reiterated, in dicta, that “refusing to allow a person to practice his religion is a common form of persecution even though the only harm it causes is psychological.”⁷⁶

These religious persecution cases remove the traditional requirement that applicants show a reasonable possibility of the persecutor becoming aware of their religious beliefs. Under the reasoning of these cases, an applicant who would refrain from religious practices or expression, and as a result would avoid any possibility of persecution, can still be considered to have a “well-founded fear.” The courts’ willingness to find persecution in the absence of a reasonable chance of detection potentially has one of two meanings. Either keeping a belief concealed is considered a kind of persecution in and of itself because of the degree of psychological pain it imposes on the believer; or, concealment is such a disfavored option, so inimical to the purpose of asylum law and international norms, that it constitutes a sort of constructive persecution. In the latter case, the likelihood of persecution would be assessed on the basis of what would happen if the individual practiced her religion openly, even if, in reality, the person would conceal her beliefs to avoid persecution. The sections that follow consider each of these possible rationales in depth.

⁷⁰ *Id.* at 409.

⁷¹ *Id.* at 408.

⁷² 388 F.3d 713 (9th Cir. 2004).

⁷³ *Id.* at 719.

⁷⁴ *Id.* at 717, 721–22.

⁷⁵ *Kazemzadeh v. Att’y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009); *see also* *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997) (noting that persecution may include forbidding members of a religious group, such as Jehovah’s Witnesses, from practicing openly).

⁷⁶ *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011).

B. Psychological Persecution When Compliance is "Profoundly Abhorrent"

"Persecution" typically evokes images of physical torture, serious bodily harm, or imprisonment, but these outcomes are not always necessary for the purposes of asylum law.⁷⁷ In fact, there is no singular definition of persecution apart from the very general definition the BIA provided in *Acosta*: "harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome."⁷⁸ Without an established list of acts that constitute persecution, courts give meaning to the term on a case-by-case basis. For example, the BIA and courts have been receptive to the claim that severe economic deprivation is a form of persecution.⁷⁹ Courts have been clear that persecution must be more than mere discrimination or harassment, but the distinction between harassment and persecution remains vague.⁸⁰

The infliction of mental suffering, without physical harm or imprisonment, has been recognized as a form of persecution by the BIA and circuit courts. For example, threats that are so menacing, imminent, and concrete that they cause "significant actual suffering or harm" may amount to persecution.⁸¹ In addition, children who witness the violence and loss of freedom suffered by their family members may be able to show that they have endured mental suffering sufficient to constitute persecution.⁸² The pain suffered from emotional distress can, in many cases, have more severe, enduring consequences than pain from physical injuries. It follows that an asylum applicant who can assert a genuine fear of suffering severe psychological torment may hold a well-founded fear of

⁷⁷ *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998).

⁷⁸ *In re Acosta*, 19 I. & N. Dec. 211, 223 (BIA 1985). Circuit Courts of Appeals have provided similarly general definitions. See, e.g., *Chen v. INS*, 359 F.3d 121, 128 (2d Cir. 2004) (stating that persecution includes non-life threatening violence and physical abuse); *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993) (defining persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate").

⁷⁹ See, e.g., *In re T-Z-*, 24 I. & N. Dec. 163, 168–69 (BIA 2007) (finding that threats of loss of employment if the applicant did not have an abortion could constitute persecution if it would result in severe economic disadvantage).

⁸⁰ *Sofinet v. INS*, 196 F.3d 742, 746 (7th Cir. 1999) ("The conduct in question need not necessarily threaten the petitioner's 'life or freedom,' however, it must rise above the level of mere 'harassment' to constitute persecution."); see also *Ciorba v. Ashcroft*, 323 F.3d 539, 545 (7th Cir. 2003) (finding that police questioning and searches of the home constitute harassment, not persecution); *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (stating that harassment will likely not rise to the level of persecution without "evidence of detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture").

⁸¹ *Chavarria v. Gonzales*, 446 F.3d 508, 518 (3d Cir. 2006) (quoting *Li v. Att'y Gen.*, 400 F.3d 157, 164 (3d Cir. 2005)) (internal quotation marks omitted). Intentional infliction of mental suffering can also constitute torture under the Convention Against Torture. 8 C.F.R. §§ 208.18(a)(1), 1208.18(a)(1) (2010).

⁸² *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006).

persecution.

Forced compliance with laws that violate an individual's beliefs can give rise to a claim of psychological persecution as well. The seminal case on this issue is *Fatin v. INS*,⁸³ a Third Circuit decision. In *Fatin*, the court affirmed the BIA's rejection of an Iranian woman's asylum claim, but discussed the standards for stating a claim of psychological persecution.⁸⁴ The applicant argued both that the fundamentalist Islamic regime that came to power in 1979 would force her to engage in Muslim practices—such as wearing a chador (veil)—and that she would be punished if she did not comply.⁸⁵ She based her claim on a gender-based PSG, attesting that she was a member of a group of “Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them.”⁸⁶

Then Judge Samuel Alito agreed with the BIA that she failed to show a well-founded fear of persecution.⁸⁷ He noted that the applicant complained most fervently about having to wear a veil, but she asserted only that she would try to avoid wearing one, rather than refuse and face the consequences.⁸⁸ Upon returning to Iran, she had two options: comply with the laws or be persecuted by the authorities.⁸⁹ The court was unconvinced that compliance would constitute persecution.⁹⁰ It considered significant the fact that the applicant would not refuse to comply, implying that resisting repressive laws is a strong indication that compliance with these laws would inflict severe mental suffering.⁹¹ Judge Alito concluded that “the petitioner's testimony in this case simply does not show that, for her, the requirement of wearing the chador or complying with Iran's other gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution.”⁹² Following this reasoning, an applicant cannot establish a fear of psychological persecution without demonstrating that the required practice would be abhorrent to the applicant's deeply held beliefs.⁹³ The court opined that requiring someone to renounce his or her religion or desecrate a holy object could be regarded as a form of mental torture, and thus rise to the level of persecution.⁹⁴

⁸³ 12 F.3d 1233 (3d Cir. 1993).

⁸⁴ *Id.* at 1242.

⁸⁵ *Id.* at 1236.

⁸⁶ *Id.* at 1241. She also claimed that she was persecuted due to her political opinion of “‘freedom of choice, freedom of expression [and] equality of opportunity for both sexes,’” *id.* at 1237, but the court considered this to be essentially identical to her PSG claim. *Id.* at 1242.

⁸⁷ *Id.* at 1243.

⁸⁸ *Id.* at 1241.

⁸⁹ *Id.* at 1242.

⁹⁰ *Id.*

⁹¹ *Id.* at 1241–42.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

This psychological analysis is largely subjective; it relies on the applicant's personal reaction based on the strength of her beliefs and the degree of suffering that she would endure by acting counter to those beliefs.⁹⁵ A nominal Christian, for example, may not feel persecuted if asked to take off her decorative cross necklace and throw it on the ground, whereas a devout Catholic might.

The standard articulated in *Fatin* has been followed in other cases involving compliance with religious dress codes. In *Yadegar-Sargis v. INS*,⁹⁶ the Seventh Circuit held that an Armenian Christian woman living in Iran was not eligible for asylum because the Islamic dress code she would have had to comply with was not sufficiently abhorrent to her religious beliefs.⁹⁷ In that case, although the woman complained about the practice, she still wore the garb and was not prevented from attending church.⁹⁸ In *Safaie v. INS*,⁹⁹ the Eighth Circuit similarly denied an Iranian woman's asylum claim on the basis of her opposition to the required Islamic dress code.¹⁰⁰ The court was unconvinced that the applicant would find compliance with the laws so profoundly abhorrent that it would rise to the level of persecution, because her opposition was "not of the depth and intensity required."¹⁰¹

In another case, the Ninth Circuit initially vacated the BIA's denial of an asylum claim for a woman who was forced to comply with the Islamic dress code in Iran.¹⁰² A panel of the court agreed with the Third Circuit that when an individual is "required to conform to, or is punished for failing to comply with, laws that fundamentally are abhorrent to that person's deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in 'extreme conduct' that is 'tantamount to persecution.'"¹⁰³ On rehearing en banc, the Ninth Circuit did not reject the notion that an applicant's forced compliance with certain laws can amount to mental suffering that rises to

⁹⁵ Judge Alito also mentioned in a footnote that part of this analysis must be objective, such that a reasonable person would find the situation profoundly abhorrent. *Id.* at 1242 n.11 ("We do not suggest that an alien could establish that he or she would be persecuted or has a well-founded fear of persecution based solely on his or her subjective reactions. Presumably, conduct could not constitute persecution or 'torture' within *Acosta* unless an objective requirement is also satisfied.").

⁹⁶ 297 F.3d 596 (7th Cir. 2002).

⁹⁷ *Id.* at 605.

⁹⁸ *Id.* at 604-05.

⁹⁹ 25 F.3d 636 (8th Cir. 1994).

¹⁰⁰ *Id.* at 640-41.

¹⁰¹ *Id.* at 640 (basing its conclusion on the findings that "Safaie wore the mandatory garb beginning in 1982, that she was not harmed or mistreated for smoking or wearing makeup, that she did not assert 'some missionary fever' to defy the law, and that Safaie would be able to avoid further demonstration of her opposition to the restrictions").

¹⁰² *Fisher v. INS*, 61 F.3d 1366, 1366-67, 1378 (9th Cir. 1994) (per curiam), *rev'd en banc*, 79 F.3d 955 (9th Cir. 1996).

¹⁰³ *Id.* at 1375 (quoting *Fatin v. INS*, 12 F.3d 1233, 1240 nn.9-10, 1242 (3d Cir. 1993)).

the level of persecution, but held that the applicant failed to show that she met the standard. The court emphasized that she had not been personally singled out for punishment on account of her religious or political views and that she had not shown that she would intentionally violate the law due to her views and face persecution as a result.¹⁰⁴

Courts in other countries have also recognized the possibility of psychological persecution in this context. For example, the New Zealand Refugee Status Appeals Authority (“RSAA”) cited both *Fatin* and *Fisher* in granting refugee status to an Iranian woman who opposed the oppression of women in Iranian society.¹⁰⁵ The RSAA agreed with these American courts that persecution might include being compelled to follow laws that an individual finds abhorrent to her beliefs.¹⁰⁶

It is possible to interpret *Muhur* and its progeny in the context of the *Fatin* line of cases. The reluctance of some courts to require someone to return to a country where the only way to avoid physical harm is to stop practicing a banned religion may arise from the idea that such a situation constitutes psychological persecution.¹⁰⁷ The concealment of religion cases, however, have never explicitly discussed the psychological effects of concealment as part of their analysis. An alternative notion better explains the recent case law on concealment of religious beliefs.

C. An Alternative View: Muhur and Constructive Persecution

Persecution suffered by religious believers who are compelled to keep quiet to avoid punishment might also be described as “constructive.” Constructive persecution would arise where the act of concealment required an individual to give up a right so fundamental—such as the practice of her religion—that it became a choice which “runs contrary to the language and purpose of” asylum.¹⁰⁸ Consequently, the court should

¹⁰⁴ *Fisher*, 79 F.3d at 962–63. (“Fisher failed to show that Iran punished her because of her religious or political beliefs, or that, if she returned to Iran, she would violate the regulations because of her beliefs, thereby triggering government action.”).

¹⁰⁵ Refugee Status Appeals Authority, Refugee Appeal No. 2039/93 Re MN, at 12 (New Zealand, Feb. 1996), available at <http://www.unhcr.org/refworld/docid/3ae6b741c.html>.

¹⁰⁶ *Id.* In that case, the court found that the applicant’s loss of freedom of thought and conscience by the Iranian authorities through the mandatory Islamic dress code might qualify as mental persecution. Describing the intermingling of politics and religion in a theocratic society like Iran, the RSAA found that the woman feared persecution on account of political opinion in addition to religion. *Id.*

¹⁰⁷ *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011); see also *Kazemzadeh v. Att’y Gen.*, 577 F.3d 1341, 1357 (11th Cir. 2009) (Marcus, J., concurring) (stating the view that “any requirement that Kazemzadeh abandon his faith or practice in secret in order to conceal his conversion amounts to religious persecution under our asylum laws[.]” though it is unclear whether Judge Marcus would consider such religious persecution psychological).

¹⁰⁸ *Shan Zhu Qiu v. Holder*, 611 F.3d 403, 409 (7th Cir. 2010); see also *Kazemzadeh*, 577 F.3d at 1354 (“[H]aving to practice religion underground to avoid punishment is itself a form of persecution.”).

only consider what will happen if the individual expresses her beliefs. This approach would not dwell on the extent of the mental suffering felt by the applicant in concealing her beliefs or on whether the person would actually express these beliefs. The primary analysis of the court would be whether the applicant held a genuine belief that she wished to express, and whether such expression, if it occurred, would create a well-founded fear of persecution. *Muhur*, and its progeny, could be read to support this approach—rather than the psychological persecution approach—because the various courts focused on the applicant's religious adherence and the desire to practice openly, rather than how the applicant would feel if asked to keep quiet.¹⁰⁹ It assumes that asking a sincere believer not to practice constitutes persecution of a psychological nature, without inquiring whether it is "profoundly abhorrent" for the particular applicant to refrain from religious practice.

This formulation of constructive persecution would be consistent with how persecution has traditionally been understood by the Seventh Circuit. The court has defined "persecution" as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."¹¹⁰ Suppression of one's religious belief to avoid punishment may properly be considered an illegitimate act in light of the general American interest in protecting the rights of free expression and religious exercise the world-over.

Following this line of reasoning, it is possible that concealment of essential characteristics other than religion could constitute constructive or psychological persecution as well.

IV. CONCEALMENT OF POLITICAL OPINION

The BIA and Courts of Appeals frequently grant asylum protection to activists fleeing governments that could discover their strongly-held political convictions and persecute them accordingly. Courts have not yet addressed whether being compelled to renounce political beliefs or to remain silent about them is persecution in itself. A court disinclined to protect concealment of political opinion could choose to follow the *Mogharrabi* approach. If, however, a court decided to apply the concept of concealment as persecution to the ground of political opinion, it could either follow the *Fatin* approach of psychological persecution or the *Muhur* approach of constructive persecution.

¹⁰⁹ E.g., *Kazemzadeh*, 577 F.3d at 1353 ("The Board found that Kazemzadeh's conversion to Christianity is genuine, and it is undisputed that apostasy is a capital offense in Iran. Kazemzadeh's petition depends on whether the record compels a finding of a reasonable possibility that he will be persecuted for being a convert.").

¹¹⁰ *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993).

A. *An Overview of Political Opinion and the Mogharrabi Approach*

Authoritarian regimes hold power by suppressing political dissent, and asylum law protects those dissidents who face persecution. According to *Mogharrabi*, an asylum applicant has to show not only a critical view of his or her government, but that the government could become aware of this view and is able and willing to punish the applicant because of it.¹¹¹ The more outspoken the activist, the easier it is to meet this standard.¹¹² Even when activists could easily evade retaliation by keeping quiet, they are not expected to.¹¹³ But they are generally required to show that they have expressed, or will express, a critical opinion that could come to the attention of the authorities.¹¹⁴ According to a handbook published by the United Nations High Commissioner for Refugees:

There may . . . also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.¹¹⁵

Under this view, ascertaining whether there is a well-founded fear of persecution depends on the level of conviction the asylum applicant holds for his or her political beliefs. Courts, then, must assume the difficult task of determining whether someone's political stance is so strong that he will eventually feel compelled to speak out. Such a determination allows ample

¹¹¹ *In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987).

¹¹² See Ian Atkinson, Note, *Assumption of Risk in United States Refugee Law*, 49 VA. J. INT'L L. 273, 300 (2008) ("A political opinion applicant will normally have to show that he has affirmatively taken sides in a dispute to receive protection, putting the politically neutral applicant in a worse position than the applicant actively broadcasting an opinion that could bring about repercussions.").

¹¹³ *Id.* at 299 ("[P]ersecution could be avoided easily through the simple expedient of keeping quiet. Refugee law, however, does not require the activist to keep quiet even though the activist assumes the risk of persecution by speaking out.").

¹¹⁴ See, e.g., *Makhoul v. Ashcroft*, 387 F.3d 75, 81–82 (1st Cir. 2004) (holding that an individual who has only expressed his views on Internet chat rooms does not have an objectively reasonable fear of persecution).

¹¹⁵ U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 82, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter UNHCR Handbook], available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>. As the Supreme Court has explained, the UNHCR Handbook does not have the force of law but still "provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

room for judicial skepticism about the likelihood of an individual actually speaking out when he has so far remained silent.

Following *Mogharrabi* and the approach suggested by the UNHCR Handbook, unexpressed political opinions may generate a well-founded fear only if those opinions are reasonably likely to come to the attention of the authorities. It is problematic, though, for asylum protection to turn on whether an applicant has expressed her political views or can prove that she probably would express them in the future. Such a standard assumes, without substantiation, that only political views that compel applicants to speak out are strong enough to deserve protection, ignoring the fact that applicants who intend to conceal their views may nonetheless greatly fear being discovered. The *Mogharrabi* approach mistakenly shifts the analysis away from the genuineness of the applicant's views and requires applicants to characterize themselves as activists who will likely attract attention.¹¹⁶

This approach is flawed because it denies protection to applicants with strong political views who will keep silent in their home countries out of a legitimate fear that expressing these views will lead to severe punishment or even death. These individuals will not publicly express their views, but their fear of persecution is no less sincere. Courts have not yet adequately addressed whether a concealed political opinion that will likely remain concealed may give rise to a claim of persecution, as some courts have held it may on the grounds of religion.

B. *Application of the Fatin Psychological Persecution Approach to Political Opinion*

Fatin primarily addressed gender-based PSG claims, but acknowledged that its analysis would also apply to a related political opinion claim.¹¹⁷ Under *Fatin*'s psychological persecution approach, an asylum applicant would have to show that following the governmental policy would be so abhorrent to that individual's deepest political beliefs that it could be regarded as a form of "torture."¹¹⁸ The ordinary understanding of these strong words creates a very high burden. Abhorrent is defined in the dictionary as "so repugnant as to stir up positive

¹¹⁶ This burden is akin to the one facing homosexual asylum applicants, who often may worry whether they are visibly "gay enough" for the judge to believe their claim that they would be discovered and persecuted for their sexual orientation. Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. TIMES, Jan. 29, 2011, at A19.

¹¹⁷ Indeed, Iranian women who disobey laws to wear veils in public often consider this a political act, even if courts do not. See Olivia F. Cleaver, Note, *Women Who Defy Social Norms: Female Refugees Who Flee Islamic States and Their Fight to Fit into American Immigration Law*, 7 RUTGERS J.L. & RELIGION 6, 21 (2006) ("When a woman is required to put on a veil when she enters the public sphere, and refuses to do so, she is, among other things, making a political statement that the law requiring such clothing is unjust.").

¹¹⁸ *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

antagonism” such that the act causing it has offended something highly-revered or sacred.¹¹⁹

It certainly would not be impossible to call keeping quiet about one’s political opposition to the government “profoundly abhorrent.” For example, a democrat in China, compelled to keep silent for fear of reprisal, could argue that not being able to express her beliefs openly is deeply offensive to her beliefs. Those who prevail, however, would likely be the most fervent, impassioned political activists. They are more likely to be able to credibly assert that they would actually refuse to keep quiet about their views even when threatened by the government, as the applicant in *Fatin* failed to do.

Without evidence of outward expression of beliefs, a judge has to rely on his or her own determination of the credibility of the applicant’s testimony regarding the strength of the applicant’s beliefs. An approach that relies so heavily on an applicant’s testimony regarding the offensiveness to her beliefs may benefit religious claims more than political opinion claims. That is, even a religious layperson, who asserts that being prevented from openly practicing his faith is abhorrent, may be more likely to be believed by the judge than an individual asserting a political opinion claim. Adjudicators often assume that religion is more fundamental and harder to conceal than political opinion because of the impression, however flawed, that religion is more central to an individual’s psyche.¹²⁰ For instance, in explaining the concept of “profound abhorrence,” Judge Alito used the example of desecration of a holy object rather than a political symbol.¹²¹ In addition, religious applicants are more likely to give convincing conversion stories and personal professions of how their faith has transformed their lives, while the views of political dissidents are contextual and partly defined by their opposition to a specific political regime.

C. Expansion of the Muhur Constructive Persecution Approach

The Seventh Circuit, in a line of cases starting with *Muhur*, has fashioned an alternative, and less stringent, method for resolving cases involving concealment of beliefs: constructive persecution. The approach

¹¹⁹ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 2 (11th ed. 2005).

¹²⁰ This could be due to cultural biases on the part of American judges, since polls show that 47.4% of Americans consider religion to be very important in their lives, compared with eleven percent who consider politics to be very important in their lives. *Online Data Analysis*, WORLD VALUES SURVEY, <http://www.wvsevsdb.com/wvs/WVSAanalyze.jsp> (last visited Nov. 5, 2011) (follow “Begin analysis” hyperlink; then follow “WVS 2005–2008” hyperlink; then click “United States of America” and follow “Confirm selection” hyperlink; then follow “(V7) Important in life: Politics” hyperlink; then follow “Cross-tabs” hyperlink; then follow “(V9) Important in life: Religion” tab from drop-down window).

¹²¹ *Fatin*, 12 F.3d at 1242.

states generally that individuals who can avoid persecution for their religious beliefs by concealing them, or by refraining from practice, are not expected to do so to be eligible for asylum.¹²² Applicants need not be the most visible adherents, but they must have religious beliefs that their government could discover and suppress if they practiced openly.¹²³ The cases that illustrate this concept, such as *Muhur*, *Iao*, and *Qiu*, have so far only considered religious beliefs and practice,¹²⁴ but the same rule can be applied to political opinion.

Two of the Seventh Circuit's cases, as well as *Zhang* from the Ninth Circuit, concern Falun Gong members. Although Falun Gong members deny any political viewpoint, the Chinese government has banned the group and jailed its members due to a perceived anti-government agenda.¹²⁵ In fact, the Chinese government only started banning the practice after the group staged an apparent pro-democracy protest in 1999, indicating that China is intolerant of Falun Gong's perceived political stance.¹²⁶ Therefore, concealment of Falun Gong membership may qualify as persecution not only on religious grounds, but also imputed political opinion grounds.¹²⁷ Members of a purely political group could point to *Zhang* in arguing that they too should be protected from being compelled to conceal their group involvement.¹²⁸

If the *Muhur* approach were to be applied to political opinion cases, the implication would be that there is no significant difference between concealing political convictions and concealing religious beliefs. This approach does not rely on the applicant's subjective reaction to the government's actions, so it avoids struggling with the question of whether keeping quiet about an opinion could be as "profoundly abhorrent" as desecrating a holy object. Rather, the courts would focus on whether the individual has genuine beliefs that he wishes to express but would face

¹²² *Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004).

¹²³ See, e.g., *Shan Zhu Qiu v. Holder*, 611 F.3d 403, 407 (7th Cir. 2010) (stating that determination of whether an applicant has a well-founded fear of persecution depends on whether someone in the applicant's situation would expect persecution, and therefore even a low-level practitioner can establish a well-founded fear if the evidence shows that the police seek out and punish low-level practitioners).

¹²⁴ See *supra* Section III.A.

¹²⁵ See *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) ("Although Zhang testified that Falun Gong is not a political organization, the authorities explicitly accused Zhang of participating in anti-government activity, and the Chinese President announced that the anti-Falun Gong campaign was a major political struggle.").

¹²⁶ *Qiu*, 611 F.3d at 404.

¹²⁷ *Zhang*, 388 F.3d at 720–21 ("Accordingly, we hold that Zhang is entitled to withholding of removal on account of imputed political opinion and religion.").

¹²⁸ In fact, the Ninth Circuit, while not ruling directly on the issue, has followed the reasoning in *Zhang* to suggest that it is against the law's basic principles to require political dissidents to stop their political activity in order to avoid torture or persecution. *Edu v. Holder*, 624 F.3d 1137, 1146 (9th Cir. 2010).

persecution if he were to express them.

An expansion of *Muhur* would recognize that it does not matter whether an individual's beliefs are political or religious, because the protection of both types of beliefs is central to the purpose of asylum law, and people cannot reasonably be asked to suppress their views in order to avoid persecution. The supposed distinction between these beliefs is inconsistent with reality, as the line between religious communities and political organizations is often blurred. For much of human history, religious leaders have promoted political agendas,¹²⁹ and political figures have often built quasi-religious cults of personality.¹³⁰ For many people, a political ideology may serve the role of religion, providing rules and values by which to live. In addition, some nations do not separate church and state, and an objection to the practice of a theocratic regime can simultaneously be political and religious, especially for women who are often marginalized in such societies.¹³¹ Both religious and political beliefs can properly be considered worldviews, and preventing one from expressing a worldview could violate such a fundamental right that it qualifies as constructive persecution. Therefore, the rule from *Muhur* should be expanded to recognize that an applicant's ability to hide either a political or a religious belief does not destroy her claim of a well-founded fear of persecution on account of that belief.

V. ANALYSIS OF BOTH METHODS OF EXPANSION

Both the *Muhur* and the *Fatin* methods of interpreting asylum law in the context of unexpressed political opinion would have far-reaching consequences. A liberalized interpretation following the religion cases from the Seventh Circuit would expand the class of people who could be

¹²⁹ In one recent extreme example, a Baptist pastor in North Carolina warned members of his church not to vote for John Kerry in 2004 and then led a movement to expel those who did. *Democrats Voted Out of Church Because of Their Politics, Members Say*, USA TODAY (May 7, 2005), http://www.usatoday.com/news/nation/2005-05-07-church-politics_x.htm.

¹³⁰ E.g. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, THANK YOU FATHER KIM IL SUNG: EYEWITNESS ACCOUNTS OF SEVERE VIOLATIONS OF FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION IN NORTH KOREA 1, 73 (Nov. 2005), available at <http://www.uscirf.gov/images/stories/pdf/nkwitnesses.pdf> (discussing Kim Il Sung in North Korea, and stating, "the North Korean regime constructed and substituted an esoteric belief system that has acquired many of the characteristics of a religious cult" and that "'Thank you, Father Kim Il Sung' is the first phrase North Korean parents are instructed to teach to their children").

¹³¹ Cleaver, *supra* note 117, at 32 ("[I]n certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows.") (quoting U.N. High Comm'r of Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 26, U.N. Doc. HCR/GIP/02/01 (May 7, 2002)).

granted asylum. On the other hand, a *Fatin*-style “psychological persecution” approach would effectively close the door on many political activists fearing persecution. Regardless of the method, one must also consider whether there is a dissimilarity between religious and political views that might justify treating these protected grounds differently in the context of asylum law. If political opinions by nature are more easily concealed without violating an individual’s deepest beliefs, then they may be due less protection than religious beliefs receive under the Seventh Circuit approach. This Part will explain, however, that religious and political beliefs are similar enough to be treated equally, and as such, constructive persecution is the most appropriate way to address the concealment of these beliefs.

A. *The Weaknesses of the Fatin Approach*

1. *Problems of Proof*

The *Fatin* approach places too high a burden on the persecuted. That is, treating concealment of political opinions as psychological persecution only if it would be “profoundly abhorrent” to the applicant places an unduly high burden on applicants attempting to demonstrate a well-founded fear of persecution. The burden is so high, in fact, that in every asylum case in the United States that has followed *Fatin*, the court has found that the applicant has failed to establish that adhering to the Islamic laws would be so abhorrent to the applicant that it would constitute persecution.¹³²

Even if an individual does feel profound abhorrence, she still has to convince the judge that these emotions are genuine and rise to the level of mental torture. It is difficult to definitively prove and corroborate something as subjective as “profound abhorrence” in an applicant. Because the standard turns on the unseen, internal reaction of the individual, it can favor individuals who manifest more outward signs of distress during their testimony, such as a quivering voice and an anxious disposition.¹³³ A judge may be skeptical of an applicant with a calm demeanor claiming that she suffers psychological persecution. Nonetheless, she may still be suffering torment and merely masking her anguish as a defense mechanism. Women who have suffered sexual violence, but do not show any emotion during testimony, due to ongoing trauma, fear, and humiliation, present a common example of this

¹³² See *supra* Section III.B.

¹³³ See, e.g., Melinda McPherson et al., *Marginal Women, Marginal Rights: Impediments to Gender-Based Persecution Claims by Asylum-Seeking Women in Australia*, 24 J. REFUGEE STUD. 323, 335 (2011) (noting that some asylum officers place importance on whether an applicant who alleges that she has suffered domestic violence appears “visibly ‘in distress’”).

behavior.¹³⁴ Expert testimony from a mental health professional might help to show that mental suffering not reflected in an applicant's demeanor is nonetheless real,¹³⁵ but expert conclusions based primarily on the applicant's own statements invite skepticism and may still leave the judge with doubts as to whether this emotional reaction actually satisfies the legal standard of persecution. In addition, it can be difficult for both a political opinion and a religion applicant to convince the judge that keeping quiet constitutes torture when the applicant has nonetheless endured it for a long period of time. Because of these evidentiary problems with proving "profound abhorrence," the analysis often becomes whether this abhorrence would compel the applicant to refuse to follow the law and suffer the consequences.¹³⁶

2. Overreliance on Establishing a Refusal to Conform

The *Fatin* approach effectively asks the applicant to objectively demonstrate the importance of her beliefs by refusing to conform to state policies. In doing so, the *Fatin* approach essentially collapses into the *Mogharrabi* approach by focusing on whether the government could become aware of the applicant's view. An unexpressed political opinion would only be protected when, according to the UNHCR, "it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities."¹³⁷ But *Fatin*'s emphasis on an applicant's past refusal to conform would narrow this realm of protection even further to individuals who would intentionally, rather than accidentally, violate legal prohibitions. The *Fatin* approach fails to account for individuals who would not openly defy the government, but nevertheless may eventually reveal their hidden views inadvertently, and therefore have no less of a well-founded fear of persecution.

If *Fatin* is followed, dissidents should be evaluated based on their level of mental torment in keeping quiet, not on their readiness to face punishment for voicing their opinion. Critiquing the decision in *Fatin*, the Seventh Circuit stated, in *Yadegar-Sargis*: "Although it would seem appropriate to require that the government-imposed requirement be one

¹³⁴ *Id.* at 335–36 (2011) (describing these feelings as preventing a reaction "stereotypically considered appropriate").

¹³⁵ See Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155, 157–60 (2001) (describing how common psychological responses to persecution, such as post-traumatic stress disorder, can cause victims to become emotionally detached, and how an individual's particular response is affected by cultural norms).

¹³⁶ See *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (highlighting the fact that the asylum applicant failed to show that she was part of a group of Iranian women who [would] *refuse to conform* with those [dress] requirements even if the consequences may be severe").

¹³⁷ UNHCR Handbook, *supra* note 115, at ¶ 82.

that affects a deeply held belief, it is unclear to us why the victims must be willing to suffer whatever consequence may be visited on them as a prerequisite to claiming persecution.”¹³⁸ Essentially, *Fatin* implied that there is no great difference between feeling psychologically persecuted and being compelled to act. As the court in *Fatin* stated, women who disobey Islamic dress codes could be subject to punishment of “74 lashes, a year’s imprisonment, and in many cases brutal rapes and death.”¹³⁹ When the punishment is so extreme, courts should not place such emphasis on the willingness of applicants to endure it as a way of proving their commitment to their cause before they are able to make a valid well-founded fear claim.

B. *Justifications for Expansion Under the Muhur Approach*

If the courts simply applied the rule developed by the Seventh Circuit in religion cases to political opinion claims, applicants would have a more reasonable chance of establishing a well-founded fear of persecution. They would be able to argue that being required to conceal their political opinion “runs contrary to the language and purpose of our asylum laws”¹⁴⁰ and therefore “is itself a form of persecution.”¹⁴¹ The Seventh Circuit and other courts have already embraced this idea in the context of religion. The foregoing subsections argue that religion and political opinion should be entitled to the same protection, and that this expansion is a logical progression in asylum law, and an affirmation of both quintessentially American values and international human rights principles.

1. *Respecting Freedom of Speech*

Both the U.S. Constitution and the international asylum regime recognize the central importance of free speech. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁴² Since the Founding, free speech has been regarded as a fundamental right, critical to the functioning of a proper democracy and an enlightened populace.¹⁴³ But millions of people around the world do not enjoy the right to freely express

¹³⁸ *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 n.5 (7th Cir. 2002).

¹³⁹ *Fatin*, 12 F.3d at 1241 (quoting Brief for Petitioner at 14, *Fatin*, 12 F.3d 1233 (No. 92-3346)).

¹⁴⁰ *Shan Zhu Qiu v. Holder*, 611 F.3d 403, 409 (7th Cir. 2010).

¹⁴¹ *Kazemzadeh v. Att’y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009).

¹⁴² U.S. CONST. amend. I.

¹⁴³ Matthew Michael Calabria, Note, *Remembering Democracy in the Debate Over Election Reform*, 58 DUKE L.J. 827, 842 (2009) (“Among the rationales for free speech are the advancement of individual autonomy, the discovery of truth, and the promotion of tolerance. But one of the strongest explanations is that the right to free speech derives from the nature of democracy itself.”) (footnotes omitted).

themselves and assemble. Protecting these dissidents from suffering in silence because they would fear retribution for speaking out affirms important public policy goals. It sends a moral message about the importance of free speech, exerts diplomatic pressure on autocratic regimes, and may ultimately help to spread democracy.¹⁴⁴ Already, cases following *Muhur* recognize the importance of preserving an individual's fundamental right to practice her religion openly without fear of persecution.¹⁴⁵ To require an individual to stifle her political expression to avoid persecution would be just as contrary to the purpose of asylum law and American values as requiring her to cease practicing her religion openly.

It would likewise violate the very purpose of international refugee law, as stated in the 1951 Convention, to require asylum petitioners to avoid persecution by not exercising their fundamental right of political expression.¹⁴⁶ Under numerous international agreements, freedom of expression is an essential human right to be advanced and protected by all signatories.¹⁴⁷ In some countries, a duty is placed on asylum seekers to try to seek protection within their own country by relocating to another area where they may not be discovered and punished, a duty which has sometimes threatened this essential principle.¹⁴⁸ Courts in the United

¹⁴⁴ MATTHEW E. PRICE, *RETHINKING ASYLUM: HISTORY, PURPOSE, AND LIMITS* 70 (2009) ("In expressing condemnation, asylum also advances an instrumental goal, namely, the reform of persecutory regimes. Asylum is thus part and parcel of a broad political program aimed at solving the root causes of refugee flows by promoting the rule of law and human rights.").

¹⁴⁵ *Kazemzadeh*, 577 F.3d at 1358 (Marcus, J., concurring) ("The suggestion that a petitioner seeking asylum on account of religious persecution may be required to practice his faith in the dead of night collides with our nation's ideals about the exercise of religious freedom. The right to practice only surreptitiously and under fear of death is not free exercise. Although I do not presume to superimpose our Free Exercise Clause jurisprudence onto asylum law, the suggestion implicit in the BIA's findings and in the government's argument contradicts both the values of our founders and the values that the drafters of the Refugee Act of 1980 embodied when codifying the asylum sections of the INA.") (citations omitted).

¹⁴⁶ See Convention, *supra* note 21, at 13 ("Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms . . ."); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 150 (1991) ("Since political expression is a core human right, the claimant must enjoy a reasonable expectation of tolerance of peacefully articulated views. It is therefore inappropriate simply to discount the risk of harm on the ground that the claimant could avoid detection by keeping silent.").

¹⁴⁷ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/217(III), art. 19 (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."); International Covenant on Civil and Political Rights, art. 19, adopted Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 (also affirming the universal right of freedom of expression).

¹⁴⁸ James C. Hathaway & Michelle Foster, *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW* 357, 357-58 (Erika Feller et al. eds., 2003). In the United States, asylum protection is denied if it would be

Kingdom, for example, have denied asylum to an individual who fled persecution but then was able to avoid detection in another city by keeping his political views hidden.¹⁴⁹ But asylum law is meant to safeguard the fundamental rights and freedoms of refugees, and it violates this purpose to deny protection to applicants just because they could secure their own safety by not expressing these fundamental rights.¹⁵⁰ As the Federal Court of Australia has asserted in rejecting the argument that an individual should be expected to relocate internally and avoid practicing his religion so as to escape notice, “an assumption that a person with a strongly held religious belief should act reasonably, and compromise that belief to avoid persecution, would be contrary to the humanitarian objects of the Convention.”¹⁵¹

A more recent asylum decision from the United Kingdom seems to recognize this principle as well.¹⁵² In that case, four Zimbabwean asylum seekers argued that they should not be required to return to their country and swear allegiance to the persecutory regime in order to escape persecution.¹⁵³ The Court of Appeal¹⁵⁴ agreed, holding that being compelled to return to one’s country and lie about one’s political views, solely to avoid persecution, violates the purpose of the Refugee Convention.¹⁵⁵ Lying about political affiliation can be considered equivalent to concealing one’s true beliefs, as such, the U.K. court seems to have recognized the *Muhur* concept as applied to political opinion. American courts should follow suit.

The application of the *Muhur* approach to political opinion would recognize that political opinion is not just an internal thought, but also a worldview that finds expression in an individual’s words and actions. A democratic activist in North Korea, even if she could theoretically escape detection for her views, should not be expected to keep the manifestations of these views hidden. A court that asks her to return to North Korea and

reasonable “under all the circumstances” for the applicant to internally relocate. 8 C.F.R. § 208.13(b)(1)(i)(B) (2010).

¹⁴⁹ Hathaway & Foster, *supra* note 148, at 384 (describing a British case in which a Chinese national for whom a warrant had been issued for displaying critical posters was denied asylum because he was able to flee and stay in Shanghai for two months without being discovered by the police).

¹⁵⁰ *Id.* at 385 (“It can never be acceptable for decision makers to require asylum seekers to avoid persecution by denying their fundamental civil and political rights . . .”).

¹⁵¹ *Wang v Minister for Immigration and Multicultural Affairs*, [2000] FCA 1599, 85 (Austl.) (citing *Omar v Minister for Immigration & Multicultural Affairs*, [2000] FCA 1430, 42).

¹⁵² DJJ Manuel et al., [2010] EWCA (Civ) 1285 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2010/1285.html>.

¹⁵³ *Id.* at [4].

¹⁵⁴ The Court of Appeal of England and Wales is the second highest court in the English legal system. *Glossary*, JUDICIARY OF ENG. AND WALES, <http://www.judiciary.gov.uk/glossary> (last visited Dec. 15, 2011).

¹⁵⁵ DJJ Manuel et al., [2010] EWCA (Civ) 1285 (Eng.), at [36]–[37], available at <http://www.bailii.org/ew/cases/EWCA/Civ/2010/1285.html>.

simply keep quiet as long as she can avoid persecution completely misses the point of asylum law and sends the wrong message to the rest of the world about how the United States and the international community value freedom of speech. Freedom of speech is considered so important in the United States that the Framers ensured its inclusion in the Constitution, and the Supreme Court has repeatedly protected it—along with other forms of expression.¹⁵⁶ It may, therefore, be so fundamental that, under the *Muhur* reasoning, violation of such a right cannot be asked of asylum seekers to avoid persecution.

2. *The Similarities Between Religion and Political Opinion*

Expanding the *Muhur* approach ultimately rests on the presupposition that concealed religious and political beliefs are due the same form of asylum protection. Both religious and political ideologies seek to explain the world and provide rules on how individuals ought to live or society ought to be organized.¹⁵⁷ Political and religious groups often have organization, hierarchy, and a sense of community. Both types of ideologies also contain sets of core, defining values, such as charity or personal autonomy. To the member of a particular religious or political belief system, these values may guide the most basic of decisions, like where they work, what they eat, and how they treat other people.¹⁵⁸ Just as a Muslim may assert that praying on the floor several times a day is a manifestation of her Islamic faith, so too may a Socialist argue that organizing labor unions is based on the essential Socialist value of workers' rights. These values are highly visible in that practicing them will often manifest publicly, giving away the individual's motivation for her actions. Whether religious or political, to devoted adherents these values are "fundamental to their individual identities or consciences,"¹⁵⁹ and it could be exceptionally difficult to change or hide them even under threat of persecution.

The United States permits free speech and freedom of religion within

¹⁵⁶ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874–75 (1997) (holding that the First Amendment protects the transmission of indecent material on the internet); *United States v. Eichman*, 496 U.S. 310, 312 (1990) (holding that flag burning is a protected form of expression under the First Amendment); *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) (holding that the First Amendment protects limitless expenditures on political campaigns).

¹⁵⁷ "Religion" is defined as "a personal set or institutionalized system of religious attitudes, beliefs, and practices" or "a cause, principle, or system of beliefs held to with ardor and faith" and "ideology" is defined as "a systematic body of concepts especially about human life or culture" and "the integrated assertions, theories, and aims that constitute a sociopolitical program." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 119, at 616, 1051–52.

¹⁵⁸ LEONARD M. HAMMER, *THE INTERNATIONAL HUMAN RIGHT TO FREEDOM OF CONSCIENCE* 121 (2001) (describing how non-religious beliefs, such as veganism or pacifism, can manifest in external actions).

¹⁵⁹ *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

its borders, and asylum status is granted to prevent people from other countries from being denied these rights. It would be entirely inconsistent with the tradition of asylum law and the values espoused in American political rhetoric to decide that an individual is entitled to asylum if she can avoid persecution by hiding her religion, but not her political opinion. The similarities between the two simply do not warrant a legal distinction.

C. *Criticism of Expansion Under the Seventh Circuit Approach*

1. *The Possible Distinction Between Religion and Political Opinion*

One might argue that religion and political opinion are so different that the constructive persecution concept should not be expanded to include suppression of political views. First, it is important to note that individuals are usually born into religious groups, and socialized into traditions that are often handed down from generation to generation.¹⁶⁰ Even in a liberal democracy like the United States, between seventy and ninety percent of adults self-identify with the religious tradition of their childhood.¹⁶¹ In contrast, individuals are not born as socialists or democrats, and they generally choose to become politically active later in life. Second, an individual's family, neighborhood, or physical characteristics may reveal that she is part of a certain religious community, but members of political groups may not be as easily recognizable. Political beliefs are also considered much more fluid than religious beliefs. In democratic systems, political parties have evolving positions and regularly compromise over issues, while religious organizations adhere to a set of doctrines which are usually non-negotiable.¹⁶²

Religious views, it can be argued, are intrinsically much more visible than political views because they usually involve more traditions that affect what people wear or how they act. The cross, yarmulke, and burqa, for example, are all instantly recognizable symbols that reveal the faith of the wearer. Political symbols, such as a swastika or a hammer and sickle, are forms of expression—rather than traditional practices—that are central to the belief. Religious individuals may also have practices, such as praying before a meal or refusing to eat pork, that indicate their faith to others in public. A political individual may choose to announce her views to others but is not obligated to by any higher power. It has also been argued that religion, because it concerns eschatology and the supernatural, necessarily causes behavior that is perceived as irrational and sometimes even

¹⁶⁰ Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459, 513–14 (2004).

¹⁶¹ *Id.* at 513.

¹⁶² Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 529–30.

destructive, such that a religious viewpoint is more likely to draw the attention of others than a secular one.¹⁶³ These distinctions, taken together and compared to a religious membership, can be interpreted to show that a political opinion is much more easily concealed without breaking the individual's commitment.

On closer analysis, though, each of these distinctions is either inaccurate or insignificant. While many people are born into a religion, conversions are not uncommon. As such, a persecutor may not necessarily know the intended victim's religious affiliation based simply on her family or where she was born. People may be born into circumstances where certain political views and associations are encouraged, and this could form a part of the person's identity from an early age.¹⁶⁴ Political beliefs are not necessarily more fluid than religion; politicians on the far right or left may be just as entrenched in their views as a religious fanatic.¹⁶⁵ It is also shortsighted to argue that an individual can more easily hide her political view compared to her religious view. In the United States, freedom of speech is often taken for granted, and Americans can believe in a liberal democracy without having to fight for it. A liberal democrat in a Communist country, on the other hand, lacks the free speech to even assert this view, and may be more likely to value publicly demonstrating for that belief.

In addition, the assertion that religious beliefs by nature compel more highly-noticeable, irrational, and destructive acts fails to consider that political motivations have been behind some of history's largest programs of destruction, as evidenced by the several infamous examples of brutal twentieth-century genocides.¹⁶⁶ Both religious and political philosophies influence people's actions and have been exploited by malevolent leaders

¹⁶³ See Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 641 (1999) (explaining the argument that religion is due special treatment because religious conscience "represents deference to a god, while [secular conscience] is merely the result of individual autonomous decision"); see also Ryan Spear, Book Note, *What We Talk About When We Talk About God*, 1 HARV. L. & POL'Y REV. 495, 500–01 (2007) (describing Richard Dawkins's view of religion as a form of derangement that causes the believer to think and act irrationally).

¹⁶⁴ In Israel, political parties are so institutionally and culturally entrenched that most citizens are actually born into political parties. Jayanth Kumar Krishnan, *Public Interest Litigation in a Comparative Context*, 20 BUFF. PUB. INT. L.J. 19, 24 (2001–2002) (citing Deborah Sontag, *In Close Israeli Race, Russian Voters Hold the Key*, N.Y. TIMES, May 12, 1999, at A3).

¹⁶⁵ In fact, a majority of Americans prefer politicians who adhere to their positions rather than compromise with people they disagree with. FEWER ARE ANGRY AT GOVERNMENT, BUT DISCONTENT REMAINS HIGH, PEW RES. CTR. FOR THE PEOPLE & THE PRESS 1 (2011), available at <http://www.people-press.org/files/legacy-pdf/3-3-11%20Political%20Release.pdf> (reporting that fifty-four percent of those surveyed liked elected officials who "stick to their positions" while forty percent of those surveyed like elected officials who "make compromises with people they disagree with").

¹⁶⁶ Spear, *supra* note 163, at 500 ("More generally, hasn't the twentieth century taught us that murderous outrages hardly require religious justifications? Surely that is one of the bitter lessons of the genocides in Germany, Cambodia, Iraq, and Rwanda.").

to justify horrendous acts. There is no objective reason why a political opinion would be inherently less visible than religious affiliation; in fact, political dissidents who actively denounce the government probably come to the attention of the authorities much faster than peacefully meditating monks. Political activists may believe that wearing their affiliation on their sleeve is necessary for a true believer in the cause, even though no supernatural power or sacred text instructs them to do so.

2. The “Floodgates” Argument

Critics of expanding the Seventh Circuit approach to include political opinion may voice concerns about opening the “floodgates” of litigation such that immigration judges would be overwhelmed with asylum applications.¹⁶⁷ Judge Posner realized this concern in *Iao*, speculating in dictum that:

The number of followers of Falun Gong in China is estimated to be in the tens of millions, all of them subject to persecution. . . . Anyone, we suppose, can get hold of a book of Li Hongzhi’s teachings, start doing the exercises, and truthfully declare himself or herself a bona fide adherent to Falun Gong. The implications for potential Chinese immigration to the United States may be significant¹⁶⁸

At the time of Judge Posner’s comments, there had been only a few Falun Gong cases, and he did not foresee a sudden deluge of applications.¹⁶⁹ Falun Gong members are still persecuted, though, and in 2010 the Seventh Circuit repeated Judge Posner’s concern without further comment.¹⁷⁰ If political groups are subject to the same protection, it will become even easier for Chinese dissidents to assert their critical views and petition for protection from having to conceal them, and the courts could face millions more applicants looking for an easy way into the United States.

A related concern is that protection could extend to even the least politically active individuals. After all, in cases like *Qiu* and *Iao*, low-level Falun Gong practitioners who merely attended meetings and performed

¹⁶⁷ For a fascinating deconstruction of the “flood of immigration” metaphor as used in United States Supreme Court opinions, see Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1549–50 (2011).

¹⁶⁸ *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005).

¹⁶⁹ See *id.* (“[I]n this circuit there have been only two litigated applications for asylum based on fear of persecution for being an adherent . . . of Falun Gong . . . and in the federal courts as a whole there have been only a couple of dozen such cases since 2003.”) (internal citations omitted).

¹⁷⁰ *Shan Zhu Qiu v. Holder*, 611 F.3d 403, 408–09 (7th Cir. 2010) (quoting *Iao*, 400 F.3d at 533).

exercises were protected.¹⁷¹ This could mean that even inactive supporters of political opposition groups would be eligible for asylum. If anyone in a country of 1.3 billion people could show up to an underground democracy meeting or sign a petition, then migrate to the U.S. and demand asylum, the possible flood of immigrants would be astronomical.¹⁷²

These ominous arguments make it seem improbably easy to state a claim of political persecution and gain asylum. An expanded constructive persecution approach would increase the number of eligible applicants, but it is unlikely that there will be a significantly greater flow of immigrants who are able to truthfully assert a hidden, deeply held political ideology that invites persecution.¹⁷³ The applicant still needs to enter the United States before applying for asylum. Obtaining a visa is highly competitive and illegal methods can be dangerous and costly. Once in the United States, the applicant then has the burden of establishing that she holds a political opinion for which the government would persecute her, and that the only way to avoid this persecution would be to keep quiet about her views. If she can satisfy the fact-finder that these assertions are correct, then she would justifiably be eligible for asylum under such an approach. Fact-finders are trained to test the truth and consistency of an applicant's testimony so that an individual who fakes allegiance to a banned political group just to obtain asylum will often be discovered and denied asylum. In addition, anti-fraud and security safeguards help to catch untruthful applications and ensure the authenticity of an applicant's claim.¹⁷⁴

Where the applicant has not expressed her opinion, distinguishing between a fearful dissident with genuine concealed beliefs and an opportunistic immigrant inventing a political stance is more difficult, but this will again be within the purview of the fact-finder.¹⁷⁵ It would not

¹⁷¹ *Qiu*, 611 F.3d at 407; *Jao*, 400 F.3d at 531.

¹⁷² There are, for example, thousands of Chinese citizens who signed Charter 08, a pro-democracy petition co-authored by recent Nobel Prize winner Liu Xiaobo. Austin Ramzy, *Chinese Dissident Liu Xiaobo Wins Nobel Peace Prize*, TIME, Oct. 8, 2010, <http://www.time.com/time/world/article/0,8599,2024405,00.html>. Most of the original signers were arrested and harassed by the police, while Liu himself was sentenced to eleven years in prison. *Id.*

¹⁷³ It should be noted that in a similar situation, when Canada began accepting a new category of asylum claims based on domestic violence, it did not experience an overwhelming flood of such cases. Department of Homeland Security's Supplemental Brief at 13 n.10 (BIA 2009) (respondent anonymous), available at <http://cgrs.uchastings.edu/pdfs/Redacted DHS brief on PSG.pdf>.

¹⁷⁴ HUMAN RIGHTS FIRST, THE ASYLUM FILING DEADLINE: DENYING PROTECTION TO THE PERSECUTED AND UNDERMINING GOVERNMENTAL EFFICIENCY 26–28 (2010), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf> (discussing the many safeguards in asylum law added by the Illegal Immigration Reform and Immigrant Responsibility Act or afterwards, such as asylum applications being signed under penalty of perjury, allowing the prosecution of fraudulent asylum application filers, preparers, or attorneys, and requiring FBI fingerprint and name checks for all applicants).

¹⁷⁵ A parallel can be drawn with the difficulty in determining the true religious faith of the applicant, when he claims a fear of persecution after converting to a new religion. *Najafi v. INS*, 104

create an excessive burden as judges already regularly make credibility findings.¹⁷⁶ If the applicant is objectively credible and displays a genuine personal belief that she is too afraid to express because of the threat of government retaliation, then the judge could reasonably conclude that she has a well-founded fear.¹⁷⁷ Establishing credibility before the judge is often a laborious task for applicants who have already suffered greatly, but it guarantees that asylum is only available for those who have been deprived of their right to free expression of their strongly-held political beliefs, which are the type of dissidents that asylum law is meant to protect.¹⁷⁸ None of these concerns, therefore, would legitimately forestall extending the *Muhur* approach to protect political opinion.

Asylum law already protects people who hold a well-founded fear of persecution on account of their political opinion. Applying the expansive Seventh Circuit view that has developed in religion cases to political opinion claims would affirm the fundamental right of political expression by not expecting dissidents to keep quiet as a way to escape harm. While the court in *Fatin* warned that "persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional,"¹⁷⁹ suppression of individual religious and political views contravenes not only American values, but international human rights norms as well.¹⁸⁰ Any burden on the system caused by a modestly higher rate of successful applications is far outweighed by the interests in reducing political oppression and affirming the fundamental importance of freedom of speech.

VI. CONCLUSION

Asylum law in the United States developed in response to the pressing

F.3d 943, 949 (7th Cir. 1997) ("Determination of a religious faith by a tribunal is fraught with complexity as true belief is not readily justiciable."). In conversion cases, the court looks for outward "indicia of apostasy," *id.*, but external manifestations of a political opinion are obviously not available to corroborate the claim of an applicant holding an unexpressed opinion.

¹⁷⁶ See Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003) (discussing the importance of credibility findings in asylum cases, especially since there is usually a dearth of corroborating evidence).

¹⁷⁷ See *id.* at 381 (explaining the objective credibility approach, which focuses on whether an applicant could be believed by a reasonable person and attempts to separate from the analysis the personal biases and intuition of the immigration judge).

¹⁷⁸ See PRICE, *supra* note 144, at 57 (noting that since the late eighteenth century, asylum has focused on protecting "political offenders" who had justifiably rebelled against autocratic rule and were sought for extradition" and that this focus on political morality has deep historical roots).

¹⁷⁹ *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

¹⁸⁰ See Convention, *supra* note 21, at Preamble ("Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms . . .").

need for humanitarian responses to international crises and oppressive regimes. It created a formalized procedure for evaluating the claims of refugees and offered protective status to those who hold a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In affirming the protection of these five characteristics, the BIA has noted that these are qualities so central to an individual's identity that they cannot be changed or should not be expected to change.¹⁸¹ The First Amendment also reveals the importance of safeguarding an individual's free expression and conscience, whether political or religious.

Concealing an individual's beliefs could constitute either psychological or constructive persecution. *Fatin* recognizes that violating one's beliefs may be so "profoundly abhorrent" as to rise to the level of psychological persecution, but such a subjective analysis imposes a heavy burden on the applicant, and creates a headache for the courts. If *Fatin* becomes the standard in political opinion cases, it would likely only protect the boldest, most fanatical activists. A more sensible approach would be to label concealment of beliefs as constructive persecution, because concealment is fundamentally at odds with asylum law principles and the applicant would effectively be compelled to face persecution at the hands of the authorities. *Muhur* implicitly relies on such a theory, standing for the proposition that an individual is entitled to asylum even if she could avoid persecution by keeping her religious beliefs quiet—if she would be persecuted if she did practice as she wished.

The same protection should be offered to those who fear persecution because of their political opinion. Political and religious philosophies both contain practices, beliefs, and values that guide an individual's decisions; asking someone to conceal either would be both injurious and extremely difficult. As proponents of free speech, it would be hypocritical for the United States to send an applicant with critical views of his government back to his country and instruct him to keep quiet. Protecting dissidents from being placed in a catch-22 choice between persecution and concealment thus prevents both constructive persecution and the risk of discovery and punishment by the authorities. Although an expansive approach could cause a greater flow of asylum applicants, it would acknowledge the importance of political expression and ensure equal protection for religious and political devotees under asylum law.

Muhur and its progeny have boldly protected individuals from having to return to their country and conceal their religion even if they could avoid persecution. Going forward, applying this approach to political opinion

¹⁸¹ *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

would be both an entirely appropriate interpretation and a powerful testament to the American conception of justice.